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Public Prosecutor v Herlina Purnama Sari

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL TRIAL NO 45A-114–05 OF 2013
AZIAH ALI, ZAKARIA SAM AND IDRUS HARUN JJCA
14 JANUARY 2016

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Criminal Law — Dangerous Drugs — s 12(2) — Possession of 303.4g of heroin and 105.5g of monoacetylmorphines — Drugs found concealed inside bag carried by respondent — Mere act of transporting insufficient to prove trafficking — Defence of innocent carrier — Conviction for offence of possession instead of trafficking — Dangerous Drugs Act 1952 s 39B(1)(a)

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Criminal Law — Dangerous Drugs — s 39B(1)(a) — Trafficking in 303.4g of heroin and 105.5g of monoacetylmorphines — Appeal against acquittal — Drugs found concealed inside bag carried by respondent — Whether possession established — Whether mens rea possession established — Mere act of transporting insufficient to prove trafficking — Defence of innocent carrier raised reasonable doubt in prosecution's case — Dangerous Drugs Act 1952 s 39B(1)(a)

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Criminal Law — Dangerous Drugs — Trafficking — Possession — Whether overt act that goes beyond mere passive possession proven — Whether custody or control, knowledge of impugned drugs and knowledge of nature of impugned drugs proven — Whether knowledge of drugs could be inferred from surrounding circumstances — Mens rea possession — Whether mere act of transporting insufficient to prove trafficking — Dangerous Drugs Act 1952 s 39B(1)(a)

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The respondent was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') with the offence of trafficking in 303.4g of heroin and 105.5g of monoacetylmorphines at the Low Cost Carrier Terminal, Sepang ('LCCT'). The respondent was arrested at the LCCT when checking in for a flight. The prohibited drugs were found inside a bag carried by the respondent, concealed in boxes and picture frames. The respondent raised the defence of innocent carrier. The respondent claimed that she was from Indonesia and that she worked for an Indonesian woman by the name of Vivian. The respondent said that she had been asked to go to Malaysia to meet Vivian's friend called Jo to collect some things before proceeding to Laos. The respondent claimed that Jo gave her new luggage and a plastic bag to be given to a friend in Laos. Without any suspicion the respondent had put the plastic bag inside the luggage bag. Below the plastic bag were her belongings. The trial judge held

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that the mere act of carrying the bag was not sufficient to find that the offence of trafficking in dangerous drugs was committed under the DDA. There was no proof of any overt act on the part of the respondent. The respondent at best, merely had possession of the drugs. The trial judge further found that the presumption under s 37(d) of the DDA relied on by the prosecution had also successfully been rebutted by the defence on the balance of probabilities. Accordingly, the learned judge found that the defence had raised a reasonable doubt in the prosecution's case on a charge under s 39B(1)(a) of the DDA. The learned judge however found that the prosecution had proved beyond reasonable doubt that the respondent had committed an offence of possession under s 12(2) of the DDA. The respondent was thus sentenced to a term of imprisonment of 16 years effective from the date of arrest. The prosecution appealed against this decision.

Held, dismissing the appeal:

(1) Before the definition of trafficking under s 2 of the DDA could be invoked, possession of the impugned drugs has to be proven. The element of possession which is required to be proved in order for any act enumerated in s 2 of the DDA to constitute trafficking must be some overt act that goes beyond mere passive possession (see para 10).

(2) To prove possession, the prosecution must show that the respondent had custody or control and knowledge of the impugned drugs. This is the requirement that entails a further burden on the prosecution to prove that the respondent knew the nature of the impugned drugs she possessed, she had a power of disposal thereof and was conscious of her possession of the same (see para 11).

(3) Knowledge of the drugs could be inferred from the surrounding circumstances of the case. Considering the evidence as regards the manner in which the drugs were concealed and carried, such evidence raised an inference that the respondent knew and was consciously aware about the existence of the drugs hidden in her luggage bag (see para 13).

(4) Mere possession of the luggage bag would, at the most, show passive possession only. To constitute trafficking there must be mens rea possession accompanied by some overt act. From the totality of the evidence, the respondent merely had passive possession of the impugned drugs. There was completely no evidence showing or indicating to whom the drugs carried, transported or otherwise exported by the respondent were supposed to be delivered. The prosecution had to show that the drugs were so transported in the sense of promoting the distribution of the drugs to another. The prosecution did not lead evidence on this requisite ingredient of the act of transporting and by extension, the act of carrying or exporting the drugs (see paras 18 & 34).

(5) The respondent's evidence relating to her employer Vivian was not without any basis as it had been shown that this was not a figment of her imagination or that Vivian was a fictitious person. Vivian was in fact arrested by the Indonesian authority in connection with a drug related offence. The respondent's defence was neither a bare denial nor an afterthought. The defence's version was consistent with the suggestions made to the prosecution's witnesses during the prosecution's case (see paras 36–37).

(6) The mere act of transporting or carrying the drugs was not sufficient to prove the offence of trafficking of dangerous drugs by the respondent. The respondent merely had passive possession. The prosecution had to adduce evidence that would show that the respondent had more than just passive possession in order for the act to constitute the offence of trafficking under s 39B(1)(a) of the DDA. The fact that the respondent was transporting or carrying a quantity of drugs from one point to another did not make her a trafficker. Whether she was a trafficker in those circumstances depended on the facts and circumstances of the case (see para 38).

(7) The defence had succeeded in raising a reasonable doubt in the prosecution's case which in the result, the prosecution had failed to prove its case on the charge of the offence of trafficking under s 39B(1)(a) of the DDA. The prosecution had instead proven the offence of possession under s 12(2) beyond reasonable doubt (see para 39).

[Bahasa Malaysia summary

Responden didakwa di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dengan kesalahan mengedar 303.4g heroin dan 105.5g monoacetylmorphine di Terminal Penerbangan Tambang Murah, Sepang ('TPTM'). Responden ditahan di TPTM semasa daftar masuk untuk penerbangan. Dadah larangan tersebut ditemui dalam beg yang dibawa oleh responden, disembunyikan dalam kotak dan bingkai gambar. Responden mengemukakan pembelaan pembawa yang tidak bersalah. Responden mendakwa bahawa dia adalah dari Indonesia dan bahawa dia bekerja untuk seorang wanita warga Indonesia dengan nama Vivian. Responden mengatakan bahawa dia telah diminta untuk pergi ke Malaysia untuk bertemu kawan Vivian yang dipanggil Jo untuk mengumpul beberapa benda sebelum meneruskan perjalanan ke Laos. Responden mendakwa Jo memberikan bagasi baru kepadanya dan satu beg plastik untuk diberikan kepada kawan di Laos. Tanpa apa-apa syak wasangka responden telah meletakkan beg plastik tersebut di dalam beg bagasi. Di bawah beg plastik adalah barang-barangnya. Hakim perbicaraan memutuskan bahawa tindakan membawa beg semata-mata tidak cukup untuk mendapati bahawa kesalahan mengedar dadah berbahaya dilakukan di bawah ADB. Tiada bukti untuk apa-apa tindakan terang-terangan dari pihak responden. Responden hanya mempunyai milikan

dadah. Hakim perbicaraan seterusnya mendapati bahawa anggapan di bawah s 37(d) ADB yang dijadikan sandaran oleh pihak pendakwaan telah berjaya dibantah oleh pihak pembelaan atas imbangan kebarangkalian. Sehubungan dengan itu, hakim yang bijaksana mendapati pihak pembelaan berjaya menimbulkan keraguan munasabah terhadap kes pendakwaan atas pertuduhan di bawah s 39B(1)(a) ADB. Hakim terpelajar bagaimanapun mendapati bahawa pihak pendakwaan telah membuktikan tanpa keraguan munasabah bahawa responden telah melakukan kesalahan milikan di bawah s 12(2) ADB. Responden dengan itu telah dijatuhi hukuman penjara selama 16 tahun berkuat kuasa dari tarikh tangkapan. Pihak pendakwaan merayu terhadap keputusan ini.

Diputuskan, menolak rayuan:

(1) Sebelum definisi pengedaran di bawah s 2 daripada ADB boleh digunakan, milikan dadah yang dipersoalkan perlu dibuktikan. Elemen milikan yang dikehendaki untuk dibuktikan supaya apa-apa tindakan yang dinyatakan dalam s 2 ADB untuk membentuk pengedaran mestilah satu tindakan yang jelas melangkaui milikan pasif semata-mata (lihat perenggan 10).

(2) Untuk membuktikan milikan, pendakwaan perlu menunjukkan bahawa responden mempunyai jagaan atau kawalan dan pengetahuan tentang dadah yang dipersoalkan. Ini adalah keperluan yang melibatkan beban lanjutan ke atas pihak pendakwaan untuk membuktikan bahawa responden mengetahui sifat dadah yang dipersoalkan dimilikinya, dia mempunyai kuasa melupuskan dan sedar mengenai milikan dadah tersebut (lihat perenggan 11).

(3) Pengetahuan mengenai dadah boleh diandaikan dari keadaan persekitaran kes tersebut. Menimbangkan keterangan berhubung cara bagaimana dadah tersebut disembunyikan dan dibawa, keterangan tersebut menimbulkan inferens bahawa responden tahu dan sedar akan kewujudan dadah yang disembunyikan dalam beg bagasinya (lihat perenggan 13).

(4) Hanya dengan milikan beg bagasi, sekurang-kurangnya, menunjukkan milikan pasif sahaja. Untuk membuktikan pengedaran, perlu ada mens rea milikan disertai dengan satu tindakan terang-terangan. Daripada keseluruhan keterangan tersebut, responden hanya mempunyai milikan pasif dadah yang dipersoalkan. Tiada keterangan yang sepenuhnya menunjukkan atau menyatakan kepada siapa dadah tersebut dibawa, diangkut atau sebaliknya dieksport oleh responden yang sepatutnya diserahkan. Pihak pendakwaan perlu menunjukkan bahawa dadah tersebut diangkut dalam erti kata menggalakkan pengedaran dadah kepada yang lain. Pihak pendakwaan tidak mengikuti keterangan ke atas inti pati yang diperlukan berkenaan tindakan mengangkut dan

selanjutnya, tindakan membawa dan mengeksport dadah tersebut (lihat perenggan 18 & 34).

(5) Keterangan responden berkenaan majikannya Vivian adalah tanpa asas memandangkan ia telah menunjukkan bahawa ini bukannya satu khayalan imaginasinya atau bahawa Vivian adalah seorang yang palsu. Vivian sebenarnya ditahan oleh pihak berkuasa Indonesia berhubung dengan kesalahan berkaitan dadah. Pembelaan responden bukanlah satu penafian kosong dan pemikiran selepas. Versi pembelaan adalah konsisten dengan cadangan-cadangan yang dibuat kepada saksi pendakwaan semasa kes pendakwaan (lihat perenggan 36–37).

(6) Hanya dengan tindakan mengangkut atau membawa dadah tidak mencukupi untuk membuktikan kesalahan mengedar dadah berbahaya oleh responden. Responden hanya mempunyai milikan pasif. Pihak pendakwaan perlu mengemukakan keterangan yang akan menunjukkan bahawa responden mempunyai lebih daripada milikan pasif untuk tindakan tersebut menjadi kesalahan pengedaran di bawah s 39B(1)(a) ADB. Fakta bahawa responden telah mengangkut atau membawa kuantiti dadah daripada satu titik kepada titik yang lain tidak menjadikannya seorang pengedar. Sama ada dia seorang pengedar dalam keadaan tersebut bergantung kepada fakta dan keadaan kes tersebut (lihat perenggan 38).

(7) Pihak pembelaan telah berjaya menimbulkan keraguan munasabah terhadap kes pendakwaan yang menunjukkan pihak pendakwaan telah gagal membuktikan kesnya atas tuduhan kesalahan pengedaran di bawah s 39B(1)(a) ADB. Pihak pendakwaan sebaliknya membuktikan kesalahan milikan di bawah s 12(2) di luar keraguan munasabah (lihat perenggan 39).]

Notes

For cases on s 12(2), see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 269–277. For cases on s 39B(1), see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 436–450. For cases on trafficking, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 815–976.

Cases referred to

Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Fun Seong Cheng v PP [1997] 3 SCR 523 (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489, CA (refd)
Hoh Bon Tong v PP [2010] 5 CLJ 240, CA (refd)
Johar bin Mustapha v PP [2009] 6 MLJ 593, FC (folld)
Martin Uchenna v PP [2014] 5 MLJ 455; [2014] 1 LNS 688, CA (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 1 CLJ (Rep) 311, SC (refd)

Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241; [2003] 2 CLJ 65, CA (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (folld)
PP v Abdul Manaf Muhamad Hassan [2006] 3 MLJ 193; [2006] 2 CLJ 129, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
PP v Hairul Din bin Zainal Abidin [2001] 6 MLJ 146; [2001] 6 CLJ 480, HC (refd)
PP v Lim Hock Boon [2009] 3 MLJ 604; [2009] 3 CLJ 430, FC (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576, HC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)
Teh Hock Leong v PP [2008] MLJU 284; [2008] 4 CLJ 764, CA (refd)
Toh Ah Loh and Mak Thim v Rex [1949] 1 MLJ 54 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 12(2), 37, 37(d), 39A(2), 39B(1)(a), First Schedule

Appeal from: Criminal Trial No MT 45A-114–05 of 2013 (High Court, Shah Alam)

Aslinda Ahad (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Selvi Sandrasegaram (Gooi & Azura) for the respondent.

Idrus Harun JCA (delivering judgment of the court):

THE CHARGE

[1] The person charged in this case is a 35 year old woman namely Herlina Purnama Sari, an Indonesian national ('the respondent'). She was charged in the following terms:

> Bahawa kamu pada 30 November 2012, lebih kurang jam 5.20 pagi di Kaunter Pendaftaran Masuk Penerbangan Antarabangsa No R22, Terminal Pengangkutan Tambang Murah ('LCCT'), di dalam Daerah Sepang, dalam negeri Selangor Darul Ehsan, telah didapati mengedar dadah berbahaya iaitu heroin seberat 303.4 gram dan monoacetylmorphines seberat 105.5 gram dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

CASE FOR THE PROSECUTION

[2] At the commencement of the prosecution's case, in her opening statement ('exh P4'), the learned deputy public prosecutor ('DPP') informed the court that the prosecution would seek to prove the offence with which the respondent was charged by direct as well as circumstantial evidence and to the extent that the situation permitted, the prosecution would also rely on the presumption in s 37(d) of the Dangerous Drugs Act 1952 ('Act 234').

[3] On 29 December 2012 at about 10.30pm, acting on an information received, Assistant Director of Customs Sazali bin Unus ('PW4') gathered a team of customs officers for a briefing in connection with a drugs trafficking case. PW4 subsequently instructed the team to conduct a surveillance at the Low Cost Carrier Terminal, Sepang ('LCCT').

[4] At about 5am PW4 was informed by one of his officers namely Customs Officer Ahmad Yazid ('PW3') to the effect that the respondent was seen at the baggage screening and clearance area of Malaysia Airport Bhd ('MAHB') whereupon PW4 directed PW3 and Customs Officer Shahriza bt Ibrahim to observe and follow the respondent. PW3 in his evidence testified that he saw the respondent pull her blue luggage bag (exh P14) towards the check-in counter. The respondent was seen queing up at check-in counter R33 but subsequently moved to check-in at counter R22 where she checked-in for her flight. A baggage tag was affixed by the Air Asia employee to the blue luggage bag. Both PW3 and Customs Officer Shahriza bt Ibrahim, as the evidence showed, were standing right behind the respondent. Shortly after that, PW4 approached the respondent and upon inspecting her passport, he instructed PW3 and Customs Officer Shahriza to take the respondent and her blue luggage bag to the office of the Enforcement division, customs and excise department at the LCCT.

[5] On the instruction of Superintendent of Customs Muhammad Bukhari bin Alias ('PW6') who was the investigating officer, PW4 opened the respondent's blue luggage bag from which he found on top of the luggage bag a plastic bag containing two boxes ('exhs P11A and P11B') wherein two picture frames were found from each box ('exhs P24A and P24B'). PW4 did not find anything suspicious or incriminating from the picture frames. However after PW4 removed the picture frame from the first box ('exh P11A'), PW4 noticed that both left and right sides of the box were bulging from the inside which upon opening he found two packets wrapped in dark blue carbon papers hidden on both the left and right sides of the box containing brownish powdery substance suspected to be drugs. From the second box ('exh P11B'), PW4 found a packet wrapped in a dark blue carbon paper and another packet

wrapped in an aluminium foil both hidden on the right side of the box which was also bulging from the inside containing brownish powdery substance suspected to be drugs.

[6] When PW4, using a test kit, conducted a test on the sample which he took from the powdery substance, the result from the test showed that the substance contained heroin and monoacetylmorphines.

[7] The respondent was immediately arrested and all the items found and seized were handed over to PW6.

[8] The unchallenged evidence of the chemist ('PW2'), showed that on analysis the brownish powdery substance was confirmed to contain drugs consisting of 303.4g of heroin and 105.5g of monoacetylmorphines ('the drugs') which formed the subject matter of the charge. The drugs are comprised in the First Schedule of Act 234 and therefore are dangerous drugs as defined in s 2 thereof.

FINDINGS OF THE TRIAL JUDGE AT THE CLOSE OF CASE FOR THE PROSECUTION

[9] We would start off by stating that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the respondent for the offence with which she was charged. We bear in mind the test and the correct law on onus of proof for the trial judge to apply at a criminal trial as lucidly expressed by the Supreme Court in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 1 CLJ (Rep) 311 as well as the guidelines laid down with characteristic brevity and conciseness of expression in *Mat v Public Presecutor* [1963] 1 MLJ 263 which we do not wish to repeat herein.

[10] The prosecution relied primarily on direct evidence to prove its case against the respondent premised on proof of the respondent's act of transporting and carrying the drugs which it was urged for the prosecution that such acts came within the definition of 'trafficking' in s 2 of Act 234. We would refer to the decision in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 wherein it was held that before the definition of trafficking under s 2 of Act 234 could be invoked, possession of the impugned drugs had to be proven. Augustine Paul J said:

> It must be observed that most of the acts that constitute trafficking as defined in section 2 of the Act like, for example, keeping, concealing, storing, transporting, and carrying dangerous drugs involve the prerequisite element of possession ... It

follows that a person cannot keep, conceal, store, transport, or carry dangerous drugs within the meaning of trafficking in the Act without being in the possession of them.

However, the element of possession which is required to be proved in order for any act enumerated in s 2 of Act 234 to constitute trafficking must be some overt act that goes beyond mere passive possession (*Public Prosecutor v Hairul Din bin Zainal Abidin* [2001] 6 MLJ 146; [2001] 6 CLJ 480).

[11] It is clear in the authorities that to prove possession, the prosecution must show that the respondent had custody or control and knowledge of the impugned drugs. This is the requirement that entails a further burden on the prosecution to prove that the respondent knew the nature of the impugned drugs she possessed, she had a power of disposal thereof and was conscious of her possession of the same (see *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; *Toh Ah Loh and Mak Thim v Rex* [1949] 1 MLJ 54; *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585; *Fun Seong Cheng v Public Prosecutor* [1997] 3 SCR 523 and *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576).

[12] Mindful of the above legal position, the learned trial judge correctly considered the question whether the prosecution had established the element of possession of the drugs by the respondent which His Lordship was satisfied were concealed in the two boxes (exhs P11A and P11B) found in the blue luggage bag (exh P14). This requisite element could either be proved by direct evidence or the relevant presumptions under s 37 of Act 234. There was clearly overwhelming evidence that could establish that the respondent had custody or control as well as knowledge of the impugned drugs and that the act of transporting and carrying it as well as the manner in which it was concealed were acts which clearly constituted trafficking as defined in s 2 of Act 234 therefore evincing intention on the part of the respondent to traffick in the said impugned drugs. Taking into account the quantity of the drugs, His Lordship further said that it would be difficult on a prima facie basis to arrive at a finding that the said drugs were not intended for trafficking. Accordingly, the principles laid down by the Federal Court in *Johar bin Mustapha v Public Prosecutor* [2009] 6 MLJ 593 could be applied to the respondent's case based on the requisite elements of control, custody and knowledge of the drugs before and at the time the drugs were found.

[13] Relying on *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489 and *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19, the learned judge correctly stated that knowledge of the drugs could be inferred from the surrounding circumstances of the case. Considering the evidence as regards the manner in which the drugs were concealed and carried, such evidence had raised an inference that the respondent knew and was consciously

aware about the existence of the drugs hidden in her luggage bag.

[14] As the unchallenged evidence of PW2 undoubtedly showed that the impugned drugs were listed in the First Schedule of Act 234, His Lordship naturally reached a finding that this essential element of the offence was established by the prosecution as well.

[15] After undertaking a maximum evaluation of the evidence adduced, the learned judge was satisfied, on a prima facie basis that each and every ingredient of the offence under s 39B(1)(a) of Act 234 had been proved. The respondent was called upon to enter on her defence.

THE DEFENCE

[16] The respondent tendered herself as a witness. No other witnesses were called by the defence. Essentially, in her evidence, the respondent testified that she was from Indonesia. While in Indonesia, the respondent was offered a job by an Indonesian woman by the name of Vivian. Her job was to pick up golden thread sarees from Laos to bring back to Indonesia for sale. Vivian instructed the respondent to go to Malaysia to meet her friend an African man by the name of Jo before proceeding to her next destination, Laos as Jo wanted her to carry something for his friend in Laos. On her arrival in Malaysia, the respondent put up at a hotel in Puchong. After two days staying in the hotel, the respondent received a call from Vivian instructing her to wait for Jo who would come to the hotel to pick her up. After Jo arrived, he took her to his apartment on the 17th floor at Koi Tropika. There were two other African men who lived at the said apartment. During the night, Jo gave the respondent a luggage and told her to put all her belongings into the new luggage. Jo had also given her a plastic bag and instructed her to give it to his friend in Laos. Without any suspicion the respondent then put the plastic bag at the top inside the luggage bag given to her by Jo. Below the plastic bag were her belongings.

[17] She slept at the apartment that night. According to her, Vivian had also telephoned and assured her not to worry as Jo was her friend. It did not occur to her to open and check the contents of the plastic bag. Neither did she ask Vivian about the contents of the plastic bag. Whilst being arrested, the respondent had given her full cooperation to the authority and provided every known detail such as Vivian's telephone number in her handphone and Jo's address. In the course of her examination-in-chief, the respondent was shown Vivian's photograph ('exh D65') to which she confirmed that the picture was Vivian's.

FINDINGS OF THE TRIAL JUDGE AT THE CONCLUSION OF THE TRIAL

[18] The learned trial judge stated that it was manifestly clear that at the relevant time the respondent had the luggage bag in her possession from which the impugned drugs were found. However, His Lordship was mindful that previous case authorities such as *Public Prosecutor v Abdul Manaf Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129 showed that a mere act of carrying the bag was not sufficient to find that the offence of trafficking in dangerous drugs was committed under Act 234. In truth, mere possession of the luggage bag would, at the most, show passive possession only. To constitute trafficking there must be mens rea possession accompanied by some overt act. There was however no proof of any overt act on the part of the respondent. The respondent at best, merely had possession of the drugs.

[19] The learned judge further found that the presumption under s 37(d) of Act 234 relied on by the prosecution had also successfully been rebutted by the defence on the balance of probabilities. Accordingly, the learned judge found that the defence had raised a reasonable doubt in the prosecution's case on a charge under s 39B(1)(a) of Act 234. The learned judge however found that the prosecution had proved beyond reasonable doubt that the respondent had committed an offence of possession of 303.4g of heroin and 105.5g of monoacetylmorphines under s 12(2) and punishable under s 39A(2) of Act 234.

[20] The respondent was sentenced to a term of imprisonment of 16 years effective from the date of arrest.

THE APPEAL

[21] The prosecution sets out nine grounds of appeal in the petition of appeal. However, the prosecution relies only on two grounds to ventilate their appeal before us. These are:

(a) failure of the learned trial judge to convict the respondent on the original charge; and

(b) the erroneous acceptance of the defence of innocent carrier,

upon which for the prosecution, it is contended in a nutshell, that the learned trial judge should have convicted the respondent for committing an offence of trafficking in dangerous drugs under s 39B(1)(a) of Act 234.

A OUR ANALYSIS OF EVIDENCE AND FINDINGS

[22] It was never disputed that the drugs found hidden in the two boxes (exhs P11A and P11B) were heroin and monoacetylmorphines. The evidence of PW2 with regard to the substances seized by PW4 and his team of officers was unchallenged. Also unchallenged was the evidence relating to the identity of the drugs in question with the unbroken chain of evidence relating to its custody never in doubt. We are therefore satisfied that this requisite ingredient of the offence that the substances seized and subsequently analysed were the drugs which are comprised in the First Schedule of Act 234 as specified in the charge was proved by the prosecution.

[23] For the prosecution, the learned deputy public prosecutor ('DPP') contended that the direct evidence adduced to prove its case was sufficient to found a conclusion that the respondent had possession of the luggage bag carried by the respondent which was found to contain the drugs.

[24] The learned DPP further submitted that the direct evidence of the prosecution's witnesses was sufficient to found a conclusion that the respondent had possession and knowledge that the luggage bag she carried contained the impugned drugs.

[25] The prosecution relies on the evidence of PW3 and PW4 to prove that the respondent had control or custody of the luggage bag. It is in evidence that the respondent was alone unaccompanied by any person when she carried the said bag. The bag was registered in the respondent's name when she checked-in at the Air Asia check-in counter. The drugs were found hidden in the two boxes. The manner in which the drugs were hidden indicated the respondent's intention to conceal it. She was above all, caught red handed, the learned DPP submitted. This direct evidence, considered in its entirety would show clearly that the respondent had control or custody hence possession of the luggage bag.

[26] The learned DPP next submitted that the respondent had knowledge about the drugs found in the luggage bag. Relying on *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489, *Public Prosecutor v Lim Hock Boon* [2009] 3 MLJ 604; [2009] 3 CLJ 430 and *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337, it was impressed upon us on the oft-repeated expression that knowledge was to be inferred from the facts before and at the time of arrest of the respondent and the surrounding circumstances of the case. Moving on from this principle, the learned DPP submitted that the condition of the drugs in which it was neatly and securely concealed from view in both opaque boxes would show that the respondent knew that the drugs lied therein, and evinced an intention and careful planning by the respondent to conceal the drugs to avoid and escape detection (see *Public*

Prosecutor v Abdul Rahman Akif and *Teh Hock Leong v Public Prosecutor* [2008] MLJU 284; [2008] 4 CLJ 764).

[27] On the evidence that the respondent's contemporaneous conduct where she appeared calm and normal, followed instructions and gave full cooperation, the learned DPP argued that her normal conduct did not necessarily mean that she was not guilty or did not have knowledge about the drugs found in her bag. In any event, she was detained at the Kuala Lumpur International Airport where the area was tightly guarded by the authority and restricted that would give her hardly any room to escape and if she did she would surely be arrested. Relying on the case of *Teh Hock Leong v Public Prosecutor* , the learned DPP submitted, such conduct could not infer that the respondent had no knowledge of the drugs in her bag.

[28] The learned DPP had also submitted that there was direct evidence of trafficking as defined under s 2 of Act 234 which we reproduce herein for easy reference:

> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act.

The prosecution relied on the act of transporting under the definition of trafficking which according to Lord Diplock in *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64, applying the maxim *noscitur a sociis*, was used not in the sense of mere conveying or carrying or moving from one place to another but in the sense of doing so to promote the distribution of the drugs to another. The prosecution also relied on the act of carrying and exporting the drugs in question.

[29] Thus, it was contended by the prosecution that the evidence of concealment of the drugs coupled with the evidence relating to the acts of carrying, transporting and exporting the drugs by the respondent constituted the offence of trafficking under s 39B(1)(a) of Act 234. The evidence of the quantity of the drugs which was much larger than was likely to be needed for her consumption raised an inference that she was trafficking in the dangerous drugs. The learned DPP cited *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241; [2003] 2 CLJ 65 in support of her submission.

[30] Submitting on the respondent's defence of innocent carrier and relying on the case of *Hoh Bon Tong v Public Prosecutor* [2010] 5 CLJ 240, for the appellant it was submitted that the respondent deliberately shut her eyes to the obvious fact that the bag she carried contained the drugs and that because she

deliberately did not want to know she was taken to know.

[31] Learned counsel for the respondent on the other hand, submitted that the learned judge had evaluated the facts and evidence in totality at the end of the defence case when His Lordship held that the respondent had raised a reasonable doubt in the prosecution's case under s 39B(1)(a) of Act 234 but found that the prosecution had instead proven its case beyond reasonable doubt against the respondent for the offence of possession of the drugs under s 12(2) of Act 234 punishable under s 39A(2) of the same Act. The appellate court should be slow and reluctant to interfere with the findings of fact and judicial appreciation of the evidence by the trial court to which the law entrusts the primary task of evaluation of the evidence unless for a very good reason which learned counsel submitted that there was none in the instant case. This point in our view may now seem obvious and trite.

[32] It would suffice for the purpose of expressing our rendition of the law on this point as we understand it, to reproduce the following excerpts from the judgment of Azahar Mohamed JCA in *Martin Uchenna v Public Prosecutor* [2014] 5 MLJ 455; [2014] 1 LNS 688:

> ... As an appellate court, we *do not have the advantage of seeing and hearing the prosecution witnesses as the learned trial judge had. It is an established principle of law that an appellate court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility* (see *Public Prosecutor v Wan Razali Kassim* [1970] 1 LNS 121; [1970] 2 MLJ 79 *and Lim Kheak Teong v Public Prosecutor* [1984] 1 CLJ Rep 207; [1985] 1 MLJ 38). As to the maximum evaluation of the evidence and the reasoning by the learned trial judge as to the inherent probabilities based upon the evidence, we find no error or flaw that warrants appellate intervention. (Emphasis added.)

[33] The prosecution led evidence to reveal that the respondent had the drugs in her possession. The learned judge as earlier-stated found that the respondent had the luggage bag in which the drugs were concealed at the material time. It was the defence case that the respondent worked for one Vivian in Jakarta and her job was to collect golden thread sarees from Laos. On the previous two occasions she went to India and Thailand at the instruction of Vivian for the same purpose. For the purpose of the respondent's visit to Laos, Vivian told her to go to Malaysia and meet Jo first. The respondent did not suspect anything when Jo gave her the plastic bag. She placed the plastic bag on top of the luggage bag which was left unlocked. It was in that condition when the respondent was detained at the airport. This was confirmed by PW4 who searched the bag.

[34] From the totality of the evidence, it would seem clear that the respondent merely had passive possession of the impugned drugs. There was completely no evidence showing or indicating to whom the drugs carried, transported or otherwise exported by the respondent were supposed to be delivered. When the prosecution's case was that the respondent transported the drugs, it would not suffice for the appellant to show that the drugs were merely conveyed, carried or moved from one place to another. The prosecution must show that the drugs were so transported in the sense of promoting the distribution of the drugs to another. The prosecution did not lead evidence on this requisite ingredient of the act of transporting and by extension, the act of carrying or exporting the drugs.

[35] When the prosecution's case is premised on direct evidence of trafficking, we should say on this aspect that to traffic in the said drugs so as to constitute the offence of trafficking under s 39B(1)(a) of Act 234, the appellant's case must be brought to be within Lord Diplock's interpretation of the word 'trafficking' in *Ong Ah Chuan v Public Prosecutor* , which, to the extent that it is relevant and applicable to this case can be adequately summarised as follows:

(a) to traffic in a controlled drug so as to constitute the offence of trafficking involves something more than passive possession or self-administration of the drug;

(b) to traffic involves doing or offering to do an overt act of one or other of the kinds specified in s 2 of the definition of trafficking;

(c) the ordinary meaning of the verb 'to traffic', in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied. This concept, involving transfer of possession, is reflected in the statutory definition itself;

(d) the act of transporting, although it must involve possession of the drugs by the person who transports them, it must mean moving the drugs from one place to another, it may mean moving it also to another person but it need not do so; and

(e) the verb 'transporting', attracts the maxim *noscitur a sociis*. The fact that the verb appears in the definition of the verb 'to traffic' of which the natural meaning in the context of trafficking in goods involves dealings between two parties at least, and that the evident purpose of Act 234 is to distinguish between dealers in drugs and the unfortunate addicts, all combine to make it clear that 'transporting' is not used in the sense of mere conveying or carrying or moving from one place to another but in the sense of doing so to promote the distribution of the drug to another.

[36] We had considered the evidence to determine whether it was the respondent who concealed the drugs in the two boxes. It is significant to note in this regard that the prosecution never suggested to the respondent that the drugs were concealed by her in the two boxes. The defence's version was that it was Jo who put the plastic bag into the luggage bag. The respondent testified to this effect and insisted during cross-examination that she did not open the plastic bag. The respondent's evidence during cross-examination was hardly challenged by the appellant. No questions were put to the respondent that she knew the plastic bag contained the drugs. The only challenge proceeding from the prosecution was in the form of a suggestion that the luggage bag belonged to her to which she denied. Notwithstanding the above evidence, it is to be noted that the respondent's evidence relating to her employer Vivian was not without any basis as it had been shown that this was not a figment of her imagination or that Vivian was a fictitious person. Vivian was in fact arrested by the Indonesian authority in connection with a drug related offence. This evidence, seen in the context of the manner in which the drugs were concealed would indicate that the respondent had knowledge about the drugs. Since she had control or custody of the luggage bag, it could be said that she had possession of the drugs.

[37] However, the respondent's defence in our judgment was neither a bare denial nor an afterthought. In fact, we find that the defence's version was consistent with the suggestions made to the prosecution's witnesses PW3, PW4 and PW6 during the prosecution's case. Those suggestions had crystallised into evidence when the respondent tendered her evidence.

[38] We agree with the finding of the learned judge that the mere act of transporting or carrying the drugs was not sufficient to prove the offence of trafficking of dangerous drugs by the respondent (*Public Prosecutor v Abdul Manaf Muhammad Hassan*). The respondent merely had passive possession. The prosecution had to adduce evidence that would show that the respondent had more than just passive possession in order for the act to constitute the offence of trafficking under s 39B(1)(a) of Act 234. The fact that the respondent was transporting or carrying a quantity of drugs from one point to another did not make her a trafficker. Whether she was a trafficker in those circumstances depended on the facts and circumstances of the case (*Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241; [2003] 2 CLJ 65). In this case the learned judge was not in error in concluding that the respondent merely had passive possession without any evidence that would show an overt act of one or other of the kind specified in the definition of 'trafficking' in s 2 of Act 234 or specifically of conveying, transporting, carrying, moving or promoting from one place to another in the sense of doing so to promote the distribution of the drug to another.

CONCLUSION

[39] Based on the foregoing, we are driven to the conclusion that as the prosecution relied on direct evidence of trafficking under s 2 of Act 234, the defence had succeeded in raising a reasonable doubt in the prosecution's case which in the result, the prosecution had failed to prove its case on the charge of the offence of trafficking under s 39B(1)(a) of Act 234. The learned judge was correct when His Lordship found that the prosecution had instead proven the offence of possession of 303.4g of heroin and 105.5g of monoacetylmorphines under s 12(2) beyond reasonable doubt and punishable under s 39A(2) of Act 234. For the reasons given, this appeal fails. The appeal is dismissed. The conviction and sentenced by the learned trial judge are affirmed.

Appeal dismissed.

Reported by Kanesh Sundrum